

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD CHRISTOPHER RUIMVELD,

Defendant-Appellant.

UNPUBLISHED

July 13, 2001

No. 227793

Baraga Circuit Court

LC No. 99-000684-FH

Before: Sawyer, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of poisoning another's drink, in violation of MCL 750.436(1), for which he was sentenced to a term of 12 to 60 months' imprisonment. We affirm.

This case arose when Corrections Officer Deanne Snyder, at Baraga Maximum Security Prison, became ill immediately after drinking from a cup of coffee. Snyder poured the coffee from a pot in the staff coffee room and left the cup unattended for approximately five minutes, while she attended to her duties on the unit. At the time of the incident, defendant was out of his cell performing his duties as a porter, which included the supervised possession and use of chemical cleaning agents.

Two other officers were on duty at the time of the incident. One officer testified that he saw defendant enter the coffee room, chemicals in hand, around the same time that he observed Officer Snyder enter the room. The other officer testified that he allowed defendant to enter the coffee room to retrieve a box of gloves worn by the porters when using the chemical cleaning agents. Forensic testing revealed that the coffee cup and coffee residue contained the disinfectant used by the porters on the unit.

Defendant raises six issues on appeal. He first contends that he was denied his Sixth Amendment right to trial by a jury comprised of a fair cross-section of the community. This Court reviews de novo a trial court's legal determination of whether a defendant's right to a jury representing a fair cross-section of the community was violated. *People v Smith*, 463 Mich 199, 203, 215; 615 NW2d 1 (2000).

To establish a prima facie violation of the fair cross-section requirement, a defendant must show ““(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.”” *People v Hubbard (After Remand)*, 217 Mich App 459, 473; 552 NW2d 493 (1996), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). Defendant satisfied the first prong of the above test because African-Americans are recognized as a distinctive group for Sixth Amendment fair cross-section purposes. *Smith, supra* at 203, 215; *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000). However, defendant has failed to satisfy the remaining prongs of the test. He has presented no evidence regarding the population of the community and no evidence regarding systematic exclusion. His bald assertion of systematic exclusion is insufficient to support his claim. *Id.* at 526-527.

Defendant next contends that the trial court abused its discretion in refusing to grant his motion for new trial on the basis of newly discovered evidence. This Court reviews for abuse of discretion a trial court’s ruling on a motion for new trial. *Hubbard, supra* at 472. To merit a new trial on the basis of newly discovered evidence, defendant must demonstrate that (1) the evidence itself, not merely its materiality, was newly discovered, (2) the evidence is not cumulative, (3) including the new evidence would probably cause a different result, and (4) using reasonable diligence, the defendant could not have discovered and produced the evidence at trial. *People v Sharbnaw*, 174 Mich App 94, 104; 435 NW2d 772 (1989).

The evidence now proffered by defendant is the testimony of another inmate who was incarcerated in the prison when Officer Snyder became ill. We conclude that the inmate’s testimony does not constitute newly discovered evidence. First, defendant admits that he knew, at the time of trial, that this potential witness possessed exculpatory evidence. However, defendant claims that he did not know the witness’s first name and could not locate him because the witness transferred to another prison. Because defendant knew the exculpatory nature of this witness’s potential testimony before trial, he cannot claim on appeal that the testimony is “newly discovered.”

Even if we considered the proffered evidence to be newly discovered, we would conclude that the trial court correctly denied defendant’s motion for new trial because including this evidence probably would not have caused a different result. Defendant claims that the witness would have testified that he saw a second porter enter the coffee room with cleaning materials, shortly after Officer Snyder left that room. During trial, two officers testified that another porter was out of his cell at the time of the incident. Further, one of those officers testified that two bottles of cleaning agents were located in the vicinity of the coffee room, awaiting use by another porter. The second porter also testified at trial, denying any involvement in the incident. Given this testimony and defendant’s arguments at trial, the jury knew that defendant blamed the other porter for the crime. The jury also knew that the other porter had access to the coffee room and cleaning chemicals. In spite of that evidence, the jury determined that defendant poisoned the officer’s coffee and rejected his argument that the other porter was responsible. Accordingly, we cannot say that including the missing witness’s testimony would have caused a different result at trial.

Defendant next contends that the missing witness was not produced at trial because defendant's trial counsel failed to exercise due diligence in locating the witness. Therefore, defendant argues that he was deprived of effective assistance of counsel. To establish an ineffective assistance claim, the defendant must demonstrate both that counsel's performance was deficient and a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant. *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). A claim of ineffective assistance of counsel should be raised by a motion for new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because defendant took no steps to develop a testimonial record in support of his ineffective assistance claim, our review is limited to the existing record. *Snider*, *supra* at 423.

Defendant has produced absolutely no record evidence from which this Court can evaluate the diligence or lack of diligence exercised by his trial attorney in an effort to locate the alleged witness. Curiously, in defendant's motion for new trial, defendant's appellate counsel expressly averred that defendant's trial counsel was unable to locate the potential witness, "despite due diligence." Further, in support of his motion for new trial based on newly discovered evidence, defendant argues that the witness could not have been discovered and produced at trial, despite diligent efforts. Defendant cannot argue that his trial counsel was ineffective for failing to accomplish something that defendant claims was impossible.

Defendant next contends that his conviction should be reversed because the prosecutor presented insufficient evidence to sustain a verdict of guilt beyond a reasonable doubt. To determine whether the prosecutor has presented sufficient evidence to sustain a conviction, we must review the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jernell Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This requires *sufficient* evidence of guilt on each element of the crime, not simply the existence of *any* evidence with regard to each element. *Id.* at 722-723.

In the instant case, proof of the circumstances surrounding Officer Snyder's poisoning rested primarily on the testimony of witnesses. The record indicates that the jury did not hurriedly reach a verdict. Further, it did not do so without careful attention to its duty. Viewing the evidence in the light most favorable to the prosecution, we are convinced that the evidence presented in the instant case was sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt. Therefore, there was no plain error in the jury's verdict.

Defendant next contends that the trial court deprived him of a fair trial by ordering him to remain shackled during trial. This Court reviews a trial court's decision to restrain a defendant during trial for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). Freedom from shackling is an important component of a fair trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). Therefore, a defendant should not be shackled during trial unless extraordinary circumstances demand it. *People v Jankowski*, 130 Mich App 143, 146; 342 NW2d 911 (1983). Ordinarily, shackling of a defendant during trial is permissible only to prevent the defendant's escape, prevent the defendant from injuring someone in the courtroom, or maintain order during the proceedings. *Id.*; *Dunn*, *supra* at 425-426. In the instant case, there is no record evidence that

defendant presented any of the risks that shackling is intended to prevent. Apparently, defendant remained shackled during trial simply because shackling was routine procedure in the courthouse when a prisoner was in an area outside the secure perimeter of the prison. We conclude that the trial court abused its discretion by ordering defendant to remain shackled during trial.

In *People v David Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987), this Court found that the use of restraints during trial was unjustified, but concluded that the error was harmless because the jury could not see the restraints. We conclude that any error in the present case regarding defendant's shackling was similarly harmless. The jury was aware from the facts of the case that defendant was not only the accused in a criminal trial, but was currently incarcerated in the prison on an unrelated charge. While this fact did not justify defendant's restraint, we are inclined to believe that, precisely because of this fact, the jury did not place any unfair importance on defendant's being shackled during trial.

Finally, defendant contends that he was denied a fair trial because the proceedings occurred in an auxiliary courtroom located in an administrative building on prison grounds. Defendant moved for a change of venue, arguing that the location of the trial created a high probability of prejudice, due to the inference of guilt associated with the location. The trial court denied defendant's motion. This Court reviews a trial court's ruling on a motion for change of venue for an abuse of discretion. *People v Jendrzewski*, 455 Mich 495, 500; 566 NW2d 530 (1997).

"A change of venue is not necessary if jurors can set aside their impressions or opinions and render a verdict on the basis of the evidence presented in court." *Id.* at 523. Further, in order to prevail on a motion for change of venue, the defendant bears the burden of showing that the jurors have a preconceived opinion as to his guilt. *People v Marsh*, 108 Mich App 659, 669; 311 NW2d 130 (1981). The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury. *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). In the present case, counsel for both prosecution and defense examined the prospective jurors to determine any potential prejudice or bias about the case. Several potential jurors were in fact dismissed for cause because of prejudice or bias. Defendant has failed to show that the impaneled jury was actually prejudiced or that there was an atmosphere that created the probability of prejudice. We believe that an impartial jury was selected and that the trial court did not abuse its discretion in denying defendant's motion for change of venue. *People v Lee*, 212 Mich App 228, 253; 537 NW2d 233 (1995)

Affirmed.

/s/ David H. Sawyer

/s/ Michael R. Smolenski